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Keywords

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By Mark Tratos

This piece was originally featured as a column at www.ipbrief.net. Columns explore various intellectual property law issues in a journalistic format, providing a detailed overview of the subject.

On May 5, 2010, the Federal Bureau of Investigation (“FBI”) shut down the website www.HTMLComics.com (“HTMLComics”) and confiscated all of the website’s servers after a search for evidence of copyright infringement.¹ The FBI conducted their investigation with help from the Department of Justice (“DOJ”) and a consortium of comic book publishers including Marvel Comics (“Marvel”), DC Comics (“DC”), Dark Horse Comics, Archie Comics, Conan Properties Int’l LLC, and Mirage Studios Inc.² HTMLComics was thought to be the most well-known and possibly largest website on the Internet that made comics viewable to the public. The site purported to be visited 1.6 million times per day in April 2010 and displayed more than 6,630,021 pages of comic books online.³ The comics on display included some of the most famous fictional figures in entertainment today, including *Spider-Man*, *The X-Men*, *Superman*, *Batman*, *Star Wars*, *Dilbert*, *Hellboy*, and *Buffy the Vampire Slayer*.⁴ In addition to the comic books, the website supposedly displayed the Bible and other “written works”⁵ like *Playboy Magazine* and *Maxim Magazine*.⁶ A lawsuit was filed in Tampa federal court on



May 27.⁷

The hosting of literature online is not a new issue for intellectual property attorneys. In recent years, however, one company in particular has brought the issue to the forefront of the law – Google. Starting in 2002, Google began the ambitious project of digitizing every book published on the planet.⁸ By 2004, Google began to scan 15 million books from some of the world’s most well known libraries.⁹ The project soon spurred a class-action lawsuit brought by various authors and publishers who challenged the legality of digitization.¹⁰ Eventually, a settlement was reached out of court in 2008.¹¹ While many parties are still not happy with the deal, authors and publishers are finally getting paid royalties for their works.¹² More importantly for copyright law, however, Google may only display a small portion of any book still protected by copyright; the entire book cannot be viewed online.¹³ The effort by Google to create the world’s largest digital library was halted in its tracks, only to be resuscitated by Mr. Hart a

Books, Physorg.com, May 28, 2010, <http://www.physorg.com/news194288285.html>.

7. *Id.*

8. *Google Book Search*, N.Y. Times, Nov. 13, 2009, available at http://topics.nytimes.com/top/news/business/companies/google_inc/google_book_search/index.html?scp=1-spot&sq=Google%20books&st=cse.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*; see also Brad Stone & Miguel Helft, *Terms of Digital Book Deal with Google Revisited*, N.Y. Times, November 13, 2009, at B2.

13. *Id.*

1. Press Release, Katten Muchin Rosenman LLP, *Pirate Website www.htmlcomics.com Shut Down by Coordinated Efforts of Department of Justice, FBI, Kattne and Consortium of Comic Publishers* (May 5, 2010) (on file with author).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Comic’s And The Written Word*, NerdSociety, Apr. 12, 2010, <http://www.nerdsociety.com/2010/04/12/comics-and-the-written-word-part-2/>.

6. Suzette Laboy, *Feds Sue 6 Websites for Offering Free Comic*

year later.

The history of comic books online has been relatively brief when compared to Google's attempts to digitize books, but that history has expanded quite recently. A few years ago, Marvel unveiled its digital subscription service. "Marvel Digital Comics Unlimited" allows a subscriber to pay a monthly or yearly fee to access over five thousand comic books from a digital library accessible on a personal computer.¹⁴ The library consists of recently published issues and some of the most famous books in comic book lore.¹⁵ The digital market soon expanded with the help of Apple's iPhone and iPad. Upon release of the iPhone, the Comixology App¹⁶ allows users to view licensed comic books from Marvel, DC and a plethora of independent publishers on the handheld device. The iPad soon led both Marvel and DC to create applications that allow iPad users to download comic books on the same day that the books are available on the newsstand.¹⁷ While it seemed that the major comic publishers were truly embracing the "Digital Age," Mr. Hart was set on pushing that age further by creating a digital library to overtake Google's attempts and eventually the Library of Congress. He started with comic books.

Gregory Hart is a programmer who, for a time, worked for the United States Postal Service creating programs to increase office efficiency.¹⁸ Eventually, through his own company, Database Engineers Inc.,¹⁹ he developed his work into the program that served as the viewing method for those who visited HTMLComics. Hart operated the website by receiving donations of digital comic book files from anonymous users and posting these files on the website.²⁰ The program would allow users to view, but not download, the files.²¹ Because download was near impossible, Hart claimed that his website never actually "distributed" the comics, thus making his website a "library" where one could "borrow" the book, but never actually own it.²² The eventual purpose of the HTMLComics library, according to Hart,

was to be a free digital library that would exceed the scope of the Library of Congress.²³

Hart's justification behind the website revolved around his belief that he created a library. His manifesto on this belief can be seen at his website www.librarylaws.com. Hart claims he created a library by providing a "public resource for reading material."²⁴ He did not charge money or require membership to view the files, nor did he make money from advertising on the website.²⁵ Hart claimed that his "library is a more pure form of non-profit than is a community public library, or even the Library of Congress."²⁶ Hart goes on to list several definitions of what a library is from sources like the *Merriam-Webster Dictionary*, *Encyclopedia Britannica*, and *Wikipedia*.²⁷ Finally, Hart alleged that "if our presentation of literature is interpreted as being in conflict with copyright laws, then too is every library in existence."²⁸

Throughout his justification of the website, however, Hart does not point to one court decision or one statute of copyright law in the United States that substantiates his view. In fact, in 2009 Mr. Hart was found on the website www.findlaw.com looking for legal validation for HTMLComics' actions.²⁹ Hart asked if his definition of a library would clear him from any possible violation of U.S. copyright law.³⁰ Nearly all of the responses he received on the web forum directed him to seek counsel from an attorney immediately because they believed he was in violation of several different federal laws.³¹ It appears that he should have heeded their advice.

Starting sometime in 2009, Mr. Hart began receiving some notoriety for his website³² and then cease and desist letters from the publishers themselves.³³ It is unclear what the communications asked of Mr. Hart because the publishers have chosen to remain quiet, but

14. http://marvel.com/digitalcomics/how_it_works/.

15. *Id.*

16. <http://www.comixology.com/digital/>.

17. Joshua Mogle, *Digital Comics and YOU!*, Multiversity Comics, June 25, 2010, <http://www.multiversitycomics.com/2010/06/digital-comics-and-you.html#more>.

18. See *Comic's And The Written Word*, *supra* note 5.

19. <http://www.databaseengineers.com/>.

20. See *Comic's And The Written Word*, *supra* note 5.

21. *Id.*; <http://www.librarylaws.com/>.

22. <http://www.librarylaws.com/>.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. Posting of Database Engineers, Inc. to FindLaw, http://boards.answers.findlaw.com/n/pfx/forum.aspx?tsn=1&nav=messages&webtag=fl-small_busine&tid=54640 (Mar. 9, 2009).

30. *Id.*

31. *Id.*

32. Lucas Siegel, *Attn: Marvel and DC Legal Departments*, <http://blog.newsarama.com/2009/01/15/attn-marvel-and-dc-legal-departments/> (Jan. 15, 2009).

33. See Laboy, *supra* note 6.

Mr. Hart did make a few statements online that provide some insight. He told the website www.Nerdsociety.com that both “Marvel and DC leave me alone as long as I stay 6 months to a year behind” the publication date of the books.³⁴ It should be noted, however, that the Marvel digital comic service does not put most comic books online until at least a year after the original publication date.³⁵ Hart also posted on the web-forum of www.thenostalgialeague.com, stating that he had “spoken with Marvel’s legal department and other lead officers within their corporate structure” and he confirmed his “approach is not distribution, hence the reason we’ve been around for over a year.”³⁶ Mr. Hart also claimed on the forum, “Google is using our site as reference as how to create an online library, and not violate copyright laws.”³⁷ Considering the current state of Mr. Hart’s website though, it appears that he was unable to escape a fate similar to that of Google Books.

As discourse about HTMLComics increased around the Internet, so did the scrutiny of Hart’s motives for creating the website. The pending lawsuit against Mr. Hart alleges that he told Marvel’s attorneys that if the company did not consent to a revenue-sharing agreement, he would keep the site up and refuse to charge people to view the comics.³⁸ Comic book creator Colleen Doran also alleges that in her encounters with Mr. Hart he was very concerned with making money through the site.³⁹ She says that she asked Mr. Hart to remove her work from his website and he responded, “We’ll see you in court and we’ll be the ones cashing your compensatory check.”⁴⁰ If Mr. Hart was trying to establish a “free” library for the world to use, he appeared to be trying to find plenty of other ways for HTMLComics to make money.

So where did Mr. Hart go wrong? While the lawsuit no doubt charges Hart with multiple violations of U.S. Copyright law, the most blatant violation appears to be that of the Right of Public Display.⁴¹ Title 17, Chapter 1, Section 106, clause 5 of the U.S. Code gives the owner of a copyright the exclusive right to show the

copyrighted work to the public. Whether the artists and writers own the rights to their own work or if those rights have been licensed should not matter to the court. Hart displayed these works to the public without owning any rights to the works. Mr. Hart has claimed that he would only be liable if he “distributed” the books,⁴² but the statute requires only that the work be displayed. To “display,” an infringer need only show a copy of the work through some device or process.⁴³ These were digital copies of the books displayed online for all the public to see. It should not matter if the website was a “library” or not. From the facts here, it appears that Mr. Hart will have a tough time defending himself in this suit.

Mr. Hart believes he is right in his quest to create his “library,” whether it is legal or not. Unfortunately, the precedent of how Google was forced to handle its digital books project does not bode well for Mr. Hart. Only time will tell where this case ends up, but one man taking on a resurging comic book industry does not sound like an easy fight to win^{3/4}not unless that one man is Superman.

34. See *Comic’s And The Written Word*, *supra* note 5.

35. <http://marvel.com/digitalcomics/hq/>.

36. Posting of Gregory Hart to *The Comics Rack*, <http://thenostalgialeague.yuku.com/topic/2387> (Dec. 29, 2009).

37. *Id.*

38. See Laboy, *supra* note 6.

39. Pirate Website raided by FBI UPDATED, May 5, 2010, <http://adistantsoil.com/2010/05/05/pirate-website-raided-by-fbi/>.

40. *Id.*

41. 17 U.S.C. § 106 (2002).

42. <http://www.librarylaws.com/>.

43. 17 U.S.C. § 106 (2002).